tion for the assignment, the sum of $94,656.87 represented the fair market value of the unharvested crop and $3,200 represented the fair market value of the unexpired leases."[4] The Commissioner of Internal Revenue, as was recited in the trial court's opinion, "by amendment to his answer . . . and in the alternative alleged that if the sales are recognized, the portion thereof *attributable* to unharvested crops is taxable to petitioners as ordinary income under the provisions of section 1231 (b) (4) of the Internal Revenue Code of 1954."[5] It was this alternative contention which the trial court sustained after expressly recognizing that it was petitioners' position that they "assigned leaseholds to Black Land and did not sell unharvested crops to it."[6]

Therefore, it is grossly inaccurate for the Commissioner of Internal Revenue to have "answered" the petition for a writ of certiorari by stating in his memorandum in opposition that petitioners assert that the $3,200 *received for the leasehold* should be accorded capital gain treatment under 1954 Code Section 1231 (b) (1)". First, petitioners have always asserted that it is the $97,856.87, which the trial court found as fact had been paid for the leaseholds, that is entitled to the benefits of Section 1231 (b) (1). That is what this case is all about, and the effort to portray it as respondent attempted, after having obtained a thirty day extension of time within which to file its two page memorandum, is tantamount to an admission that he is unable to meet the petition

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[4] R. at 208.

[5] R. at 218.

[6] R. at 223-224.

on the merits. Second, the trial court did not find that $3,200 was *received for the leasehold* and $94,000 was *received for the growing crop* as the Commissioner states. Instead it sustained respondent's alternative position that the portion of the $97,856.87 sale price "*attributable* to unharvested crops is taxable to petitioners as ordinary income under the provisions of section 1231 (b) (4)."[7]

In short, what has happened here is that petitioners, who are entitled to the benefits of section 1231 (b) (1), as enacted for them by the Congress, have been deprived of that Congressional grace by the Commissioner who has broken up their sale of leaseholds into parts, made something out of it different from what it was, and then proceeded to tax the transaction as he remade it.

The implicit rationale of the lower courts' holdings and respondent's memorandum in opposition is that upon the sale of a leasehold qualifying as "property used in the trade or business", as defined in section 1231 (b) (1) of the 1954 Code, the seller is required under *Watson* v. *Commissioner,* 345 U.S. 544, to comminute "the sale price into its fragments and these are to be separately matched against the definition in" section 1231 (b) (1) and section 1231 (b) (4). This must be so because although the trial court found as fact that petitioners assigned the leaseholds for an agreed consideration of $97,856.87 which was paid, it nevertheless concluded it could *attribute* that portion of the value of the leaseholds represented by the value of the unharvested crops growing on the land covered by the leaseholds ($94,657.87) and tax that portion of the sum received for the leaseholds as ordinary income

[7] R. at 224.

under section 1231 (b) (4). That is, a section added to the law long after section 1231 (b) (1) had been enacted, namely section 1231 (b) (4), and for the purpose of granting additional benefits to taxpayers, was invoked to take away from taxpayers a benefit they had been entitled to under section 1231 (b) (1).

There is no case law or statutory authority for the proposition that upon the sale of a leasehold under section 1231 (b) (1), the underlying assets are to be individually examined in order to determine whether or not each is entitled to capital gain treatment under section 1231 (b) (1).

If the Commissioner of Internal Revenue wishes to change the law that upon the sale of a leasehold the seller is entitled to capital gain treatment, he should be required to ask Congress to act. He should not be allowed to do so by administrative interpretation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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